Mental Health (Recovery Model) Bill 2015

Explanatory Notes

Short title Mental Health (Recovery Model) Bill 2015

Policy objectives and the reasons for them

The primary purpose of the Mental Health (Recovery Model) Bill 2015 is to improve and maintain the health and wellbeing of persons with a mental illness who do not have the capacity to consent to treatment or care. The Bill also enables persons to be diverted from the criminal justice system if found to have been of unsound mind at the time of an alleged offence or to be unfit for trial.

Where necessary, the Bill aims to protect the community if persons diverted from the criminal justice system may be at risk of harming others.

The objects are to be achieved in a way that:

• safeguards the rights of persons

• adversely affects the rights and liberties of a person with a mental illness only if there is no less restrictive way to protect the person's health and safety or to protect others, and

• promotes the recovery of a person with a mental illness, and their ability to live in the community, without the need for involuntary treatment or care.

The Bill results from a review of the Mental Health Act 2000, which was initiated by the Minister for Health to improve the delivery of health services to the people of Queensland

Achievement of policy objectives

The key aspects of the Bill are outlined below.

• Treatment authorities

Treatment authorities are made under the Bill by authorised doctors and provide a lawful authority to treat a person with a mental illness who lacks the capacity to consent to treatment. A person may be placed on a treatment authority if an authorised doctor believes that the treatment criteria apply to the person and that there is not a less restrictive way to provide treatment and care for the person, for example, under an advance health directive.

Key elements of the treatment criteria are that the person lacks capacity to consent to treatment for a mental illness and there is a risk of serious harm to the person or others.

A person subject to a treatment authority is to be treated in the community, on a community category of the authority, unless an authorised doctor decides that the person's treatment and care needs can only be met by the person being an inpatient. Authorised doctors are responsible for treatment authorities and may amend a person's treatment authority by changing the category of the authority, the conditions on the authority or the nature and extent of limited community treatment (which enables treatment in the community for up to 7 days).

• Persons in custody

A person in custody, for example in a watch-house or in prison, may be transferred to an authorised mental health service for an assessment to decide if a treatment authority should be made for the person, or for the treatment and care for the person's mental illness.

• Psychiatrist reports

If a person subject to a treatment authority, forensic order or court treatment order is charged with a serious offence, the person or someone on the person's behalf, may request that a psychiatrist report be prepared on whether the person was of unsound mind at the time of the alleged offence or is unfit for trial. The chief psychiatrist may also direct a psychiatrist report for a person if a person is charged with a serious offence and the chief psychiatrist believes it is in the public interest. A serious offence is an indictable offence other than an offence that must, under the Criminal Code, be heard by a magistrate.

Mental Health Court

The Mental Health Court hears references on whether persons charged with a serious offence were of unsound mind at the time of an alleged offence or unfit for trial. Where the court determines a person was of unsound mind at the time of the alleged offence or unfit for trial, the court may make a forensic order or a court treatment order (see below) for the person. Forensic orders may be a forensic order (mental condition) or a forensic order (disability). In making an order, the court must also determine the category of the order (inpatient or community) and, if the category is inpatient, any limited community treatment for the patient. Authorised doctors must not amend a person's forensic order by changing the category of the authority, the conditions on the authority or the nature and extent of of Mental Health Court and the Mental Health Review Tribunal.

If the court determines a person is unfit for trial, but the unfitness is not of a permanent nature, the matter of the person's fitness for trial is referred to the Mental Health Review Tribunal for regular review. For forensic orders for specified offences, the court may impose a non-revoke period of up to 7 years for the order.

Magistrates Courts

Magistrates courts may discharge persons charged with an alleged offence if the court considers the person appears to have been of unsound mind at the time of the alleged offence or is unfit for trial.

Magistrates courts may also order that a person before the court be examined by an authorised doctor to decide if a treatment authority should be made for the person or to make recommendations about the person's treatment and care.

Treatment and care of patients

Authorised doctors and administrators of authorised mental health services have responsibilities for the treatment and care of patients under the Bill. An authorised doctor must examine patients and record in the patient's health records the treatment and care to be provided to the patient. To the extent practicable, decisions in relation to the treatment and care of a patient are to be decided in consultation with the patient and the patient's family, carers and other support persons. Administrators must take reasonable steps to ensure that the patient receives appropriate the planned treatment and care. The administrator must ensure the systems for recording planned and actual treatment can be audited.

The performance of electroconvulsive therapy and non-ablative neurosurgery (such as deep brain stimulation) is regulated under the Bill. Psychosurgery is prohibited under the Bill.

Mechanical restraint and seclusion

The use of mechanical restraint and seclusion on involuntary patients in authorised mental health services is regulated under the Bill. The use of mechanical restraint in an authorised mental health service must be approved by the chief psychiatrist. Mechanical restraint and seclusion may only be used if it is necessary to protect the patient or others from physical harm and there is no less restrictive way of providing treatment and care to the patient.

Reduction and elimination plans are used to approve the use of mechanical restraint and seclusion by the chief psychiatrist in the context of eliminating its use for the patient.

Rights of involuntary patients and others

The Bill provides for a statement of rights for involuntary patients to be made available to patients. Public sector authorised mental health services must employ or engage a patient rights adviser in the service to advise patients and the patient's family, carers and other support persons of their rights under the Bill. Subject to a patient's right to privacy, a patient may be visited by family, carers and other support persons. The patient may also be visited by a health practitioner, or a legal or other adviser. If a patient has a nominated support person or personal guardian or attorney, any notices to be given to a patient must also be given to the nominated support person or guardian.

A patient may request a second opinion about the patient's treatment and care if an authorised mental service has been unable to resolve a complaint about the treatment and care.

• Chief psychiatrist

The chief psychiatrist is appointed under the Bill to protect the rights of involuntary patients in authorised mental health services. This is also extended to voluntary patients in authorised mental health services, such as those being treated under advance health directives. The chief psychiatrist makes policies and practice guidelines, which persons in authorised mental health services must comply with. The Bill states a number of areas for which policies must be made, including the application of the treatment criteria, the use of mechanical restraint and seclusion, and the treatment and care of forensic patients. The chief psychiatrist must also prepare an annual report on the administration of the Bill.

Information notices

Victims of unlawful acts may apply to receive specific information about the person who committed the unlawful act, including when community treatment is authorised for the person. Schedule 1 of the Bill outlines what information is to be provided.

• Mental Health Review Tribunal

The Mental Health Review Tribunal continues under the Bill with responsibility for reviewing:

- treatment authorities
- forensic orders
- court treatment orders
- the fitness for trial of particular persons
- the imposition of monitoring conditions that involve a tracking device, and

• the detention of minors in high security units.

The Mental Health Review Tribunal also hears applications for:

• examination authorities, which authorise the involuntary examination of a person

• the approval of regulated treatments (electroconvulsive therapy and non-ablative

neurosurgery), and

• the transfer of forensic patients and patients on court treatment orders into and

out of Queensland.

The Bill states when periodic reviews of treatment authorities, forensic orders and court treatment orders must take place. Patients, or someone on behalf of the patient, may apply for a review of an authority or order at any time. In reviewing treatment authorities, forensic orders and court treatment orders, the Mental Health Review Tribunal has the power to confirm or revoke an authority or order on the basis of the criteria stated in the Bill. In reviewing treatment authorities, forensic orders and court treatment orders, the tribunal may also change the category of the authority or order, or change limited community treatment under the authority or order.

The Bill represents a major improvement to the legislative framework that applies for persons with a mental illness under Mental Health Act 2000. These improvements

can be grouped in six areas:

• Strengthened support for patients

• Improved health service delivery

• Strengthened community protection

• A more transparent and fairer Act

• Improved legal processes

• Greater value in health services.

Strengthened support for patients

The Bill will strengthen patient rights by improving the criteria by which a person is placed on a treatment authority (to replace an involuntary treatment order under the previous Act), to focus on a person's lack of capacity to consent to treatment and the risk of serious harm to the person or others. The Bill will require an authorised doctor to consider whether a person may be treated in a “less restrictive way" before making a treatment authority. This includes treating the person under an advance health directive, or with the consent of the guardian or attorney. In conjunction with this, persons will be given the opportunity to nominate a “nominated support person" to support the person’s treatment and care at a future time if the person becomes unwell and loses capacity to consent to treatment. A nominated support person has a variety of roles under the Bill, including receiving all notices that must be given to the patient, being able to discuss confidential information about the patient, and supporting the patient or representing the patient at hearings of the Mental Health Review Tribunal.

The Bill will strengthen the rights of the family, carers and other support persons, who can play an important role in the person's care and recovery. The Bill requires authorised doctors to involve family, carers and other support persons in decisions about the patient's treatment and care, subject to the patient's right to privacy. The Bill states that patients have a right to be visited by support persons, health practitioners and legal or other advisers at any reasonable time.

The use of seclusion and mechanical restraint on involuntary patients is an area receiving attention nationally. The Bill supports the move to reduce and eliminate the use of seclusion and mechanical restraint in a number of ways, including the introduction of reduction and elimination plans that provide for the approval of mechanical restraint and seclusion in the context of a strategy of its elimination for the patient.

The Bill requires public sector authorised mental health services to engage a patient rights adviser to support patients and their support persons in understanding how the mental health legislation operates, especially patients rights. This includes advising patients and support persons on how the Mental Health Review Tribunal operates, and the person's rights at tribunal hearings.

The rights of patients at tribunal hearings will be strengthened by stating that a patient may be supported at the tribunal by a nominated support person or another person nominated by the patient. Also, the patient may be represented at the tribunal by a lawyer or another representative. For tribunal specified hearings, the Bill requires the tribunal to provide a lawyer at no cost to the patient. The hearings that this applies to are for any review involving a minor, for reviews where the Attorney General is represented, for "fitness for trial" reviews, for applications involving electroconvulsive therapy and for the review of certain monitoring conditions.

The Bill also removes the barriers to interstate transfers of involuntary patients where this may be of benefit to the patient's treatment, care and recovery. Interstate transfers are beneficial where the patient returns to closer proximity to family, carers and other support persons.

Improved health service delivery

The Bill will remove the ambiguity in the current Act about where treatment and care can be provided. The Bill will allow treatment and care to be provided in any place that is clinically appropriate. The restrictions on the use of audio-visual technology in the current Act will be removed. The Bill strongly supports recovery orientation for patients with a mental illness. This is achieved through matters such as:

- requiring that patients on treatment authorities be treated in the community unless the patient must be admitted to an inpatient unit to meet the patient's treatment and care needs
- enabling the Mental Health Review Tribunal to "step-down" a patient on a forensic order, to a court treatment order or treatment authority, when it is appropriate to do so
- enabling treatment to be provided at any clinically appropriate place in the community
- removing barriers to interstate transfers, which can assist a patient's recovery
- strengthening the use of advance health directives, which gives a person greater control over their future health care
- empowering a person to appoint a nominated support person to support the person during the acute phase of an illness, and
- ensuring equal rights of persons with a mentally illness at law.

The Bill requires authorised doctors to decide and record the treatment and care to be provided to a patient. To better align with clinical practice, this will be recorded in the patient's health records rather than in a separate “treatment plan" as is required and the current Act. The Bill emphasises the importance of involving family, carers and support persons in decisions about the patient's treatment and care, including when the patient returns to the community. This aligns with good clinical practice and will improve health service delivery and lead to better patient outcomes.

Strengthened community protection

To the extent that the legislation deals with persons who have committed unlawful acts, it is important that the community is adequately protected from any future unlawful behaviour. The Mental Health Court will be able to set a non-revoke period for forensic orders of up to 7 years for serious violent offences such as murder, rape and grievous bodily harm. This will give victims and the wider community greater certainty in the period after a forensic order is made.

The legislation will strengthen powers to deal with persons who abscond. This will include clearer powers for police to detain and return such persons. Authorised mental health services will be required to provide police with a risk assessment of persons, so that police can give priority to responding based on identified risks to the persons or others. The Bill includes a statement of principles for supporting victims of unlawful acts to guide persons responsible for administering the legislation.

Confidentiality restrictions on government agencies will no longer restrict the ability to approach a person to offer victim support services.

Victims of unlawful acts who receive information notices about a patient will be given information on the reasons a patient is given community treatment to assist the victim to understand the considerations that have gone into such a decision.

The requirement to obtain a second psychiatric opinion to revoke forensic orders for serious violent offences will be retained and expanded to include offences such as grievous bodily harm. The Bill will result in a more targeted and appropriate range of forensic orders, enabling those responsible for administering the forensic provisions to focus their resources on individuals of most concern to the community.

A more transparent and fairer Act

The Bill will remove justices’ examination orders and replace them with a substantially more limited process where a person, in consultation with an authorised mental health service, may make an application to the Mental Health Review

Tribunal for an examination authority. The Bill provides for clear and consistent criteria for statutory decisions. This is of critical importance given the restrictions on a person’s liberties that may be exercised under the Bill.

The Bill will also require the publication of chief psychiatrist policies and practice guidelines, and expand the requirements for the annual report. The Bill clearly states the circumstances in which a person may be involuntarily transported to, from, and within an authorised mental health service, and the safeguards that apply when this occurs. These provisions will be more transparent and fairer for those administering the legislation and for the persons being transported. The provisions in the Bill clearly outline when and to whom notices are to be provided. Where the Bill requires the patient to be provided with a notice by an administrator, the chief psychiatrist or the tribunal, the notice must also be given to a nominated support person, personal guardian or attorney.

Improved legal processes

The Bill rectifies a major deficiency in the current legal framework in Queensland, by expressly enabling magistrates to discharge persons who appear to have been of unsound mind at the time of an alleged offence or unfit for trial.

Magistrates will also be able to refer matters to the Mental Health Court where it appears there may be grounds for the court to make a forensic order or court treatment order for the person. The Bill will enable persons charged with serious offences who are currently on an authority or order under the Bill to request that a psychiatric report be prepared on whether the person was of unsound mind at the time of the alleged offence or unfit for trial. This replaces the current model whereby a person must mandatorily have a report prepared and subsequently referred to the Mental Health Court. The current approach is a breach of an individual's right to decide how to pursue a legal defence.

The Bill gives the Mental Health Court an additional option of making a court treatment order for a person. The intention of these provisions is to provide a less intensive form of order to apply, for example, where a person's role in a serious offence is relatively minor. Court treatment orders will 'tie' the person to involuntary treatment without the stringent oversight that applies to persons on forensic orders.

Unlike forensic orders, the court and the tribunal does not set limits on the extent of community treatment under court treatment orders. As with treatment authorities, this will be the responsibility of authorised doctors in accordance with the criteria established under the Bill. As with treatment authorities, the default category for these persons will be a community category, unless it is necessary for the person to be an inpatient. However, like forensic orders, only the tribunal may revoke a court treatment order.

The Bill also enables the Mental Health Court to consider and decide disputed matters that affect a psychiatrist's opinion, rather than referring the whole matter to the criminal courts as occurs now. The Bill will clarify the relationship between the Criminal Code and mental health legislation where a jury finds a person of unsound mind or unfit for trial. The Bill also adopts the Criminal Code's use of "unsound mind".

Greater value in health services

The Bill will replace the current *Mental Health Act 2000*, which is overly complex and difficult to administer. The Bill will reduce the compliance burden on health services in administering the Bill by reducing the volume of forms and other paperwork required under the legislation. The Bill also rectifies numerous operational problems with the current Act in areas such as the transport of patients, searches in authorised mental health services and notification requirements. The proposals will also result in greater devolvement to authorised mental health services, such as for the

appointment of authorised mental health practitioners. The removal of mandatory psychiatric reports will also enable clinician's time to be redirected to higher priority clinical areas.

Estimated cost for government implementation

The implementation of the Act will incur one-off implementation costs for education and training, the development of policies, practice guidelines and other supporting material, and the upgrade to the Consumer Integrated Mental Health Application for mental health consumers. These implementation costs are estimated at $5.2 million.

On-going costs will also be incurred for the revised court liaison service (to support the revised role of Magistrates Courts), the establishment of patient rights advisers and the revised Mental Health Review Tribunal functions. These costs are estimated at $12.1M.

Consistency with fundamental legislative principles

The proposed Bill will impact on the rights and liberties of individuals by enabling examinations, assessments, treatment and, if necessary, detention without consent.

The underpinning principle of the Bill is that a person who does not have capacity to consent to treatment may be at risk of harm or deterioration in his or her health, with no ability to make decisions to avert these adverse consequences. To remedy this, the proposed Bill will establish legislative arrangements for treatment without consent. The proposed Bill also empowers the Mental Health Court to impose orders (forensic orders and court treatment orders) on persons charged with offences. These orders authorise involuntary treatment and, if necessary, detention in an authorised mental health service or the forensic disability service. The purpose of these provisions is to protect the community where persons diverted from the criminal justice system may be at risk of harming others. The Bill will include robust safeguards to protect the rights of individuals on orders or authorities. The Bill is to expressly state that the objectives of the Bill are to be achieved in a way that:

- safeguards the rights of persons
- affects a person's rights and liberties in an adverse way only if there is no less restrictive way to protect the health and safety of the person or others; and
- promotes the person's recovery, and ability to live in the community, without the need for involuntary treatment and care.

The exercise of all relevant powers under the proposed Bill – involuntary examination, assessment and treatment – may only be undertaken if the statutory decision-making criteria are met. Examination authorities (which authorise entry to premises and an involuntary examination of a person) may only be made with prior clinical input, with the authority to be made by the independent Mental Health

Review Tribunal. An examination of a person (to determine whether a recommendation for assessment should be made), and an assessment (to determine whether a treatment authority

should be made), are undertaken by appropriately skilled clinicians, with an authorised psychiatrist confirming the authority in all instances. A person placed on a treatment authority by a psychiatrist has the authority automatically reviewed by the tribunal in 28 days after it is made, with the person having the right to apply to the tribunal for review at any time. The Mental Health Review Tribunal also reviews the continuation of forensic orders.

Psychiatrist examinations for persons charged with serious offences

The proposed Bill will provide for the right of a person on a treatment authority or forensic order who is charged with a serious indictable offence to request a psychiatrist report about whether the person was of unsound mind at the time of the alleged offence or is unfit for trial. In addition, if the chief psychiatrist (the position which will replace the Director of Mental Health) determines that it is in the public interest, the chief psychiatrist may direct a psychiatrist report for a person charged with a serious indictable offence without the person's consent. This latter authority may be seen as infringing on the rights and liberties of the person who is subject to the psychiatrist examination. The discretion to exercise this power is to be used by the chief psychiatrist only if the chief psychiatrist determines that it is in the public interest to do so. The Bill will provide safeguards for persons undergoing these examinations, including restrictions on the use of the resultant report.

Power of entry to authorised mental health services

The Bill will continue the power under the *Mental Health Act 2000* for authorised officers to visit an authorised mental health service to investigate whether the Bill is being complied with. The exercise of this power does not require a warrant. However, this power of entry is very limited – to authorised mental health services – nearly all of which are within the public sector. The power is considered reasonable given the need for involuntary patients to have their rights protected.

Suspension of community treatment

The Bill will continue the power under the *Mental Health Act 2000* for the chief psychiatrist to suspend community treatment for a class of patients if the chief psychiatrist believes there is a serious risk to the life, health or safety of a person or a serious risk to public safety. This power may be seen as infringing individual liberties in that the power may be exercised in relation to a class of persons, regardless of whether an individual constitutes a risk to the community. However, this power is consistent with the purpose of the Bill in relation to the protection of the community. This power may be exercised, for example, where there are concerns of systemic management issues within an authorised mental health service that need rectification. It may be necessary to suspend community treatment pending the rectification of these issues. As in the current Act, the proposed Bill will incorporate safeguards, including the requirement to consult with the administrator of the authorised mental health service on the impact of suspending community treatment on patients before taking action under these provisions. The chief psychiatrist's decision is appealable to the tribunal.

Monitoring conditions for involuntary patients

The Bill will continue the powers under the *Mental Health Act 2000* for the chief psychiatrist to place monitoring conditions on forensic patients. Monitoring conditions may include a requirement that a patient wear a GPS tracking device while being treated in the community.

The purpose of monitoring conditions is to provide an additional level of protection for the health and safety of a patient or others, where warranted. The imposition of monitoring conditions offers a mechanism to quickly locate a patient who has not returned from community treatment where there are concerns about the patient's safety or the safety of others. These conditions may only be placed on an order by the chief psychiatrist, the Mental Health Court or the Mental Health Review Tribunal.

As an additional safeguard, the Bill will require that the imposition of monitoring conditions by the chief psychiatrist be reviewed by the tribunal within 21 days of the conditions being imposed.

Transitional regulation-making power

The Bill enables a transitional regulation to be made about a matter to facilitate the transition to the new Bill. The inclusion of this power raises the issue of whether the

Bill has sufficient regard to the institution of the Parliament. Although the Bill provides for a range of transitional issues, it is possible that unanticipated matters may arise given the complexity of transitioning to the new Bill. It should be noted that this provision expires in 12 months.

The purpose of monitoring conditions is to provide an additional level of protection for the health and safety of a patient or others, where warranted. The imposition of monitoring conditions offers a mechanism to quickly locate a patient who has not returned from community treatment where there are concerns about the patient's safety or the safety of others. These conditions may only be placed on an order by the chief psychiatrist, the Mental Health Court or the Mental Health Review Tribunal. As an additional safeguard, the Bill will require that the imposition of monitoring conditions by the chief psychiatrist be reviewed by the tribunal within 21 days of the conditions being imposed.

Transitional regulation-making power

The Bill enables a transitional regulation to be made about a matter to facilitate the transition to the new Bill. The inclusion of this power raises the issue of whether the Bill has sufficient regard to the institution of the Parliament. Although the Bill provides for a range of transitional issues, it is possible that unanticipated matters may arise given the complexity of transitioning to the new Bill. It should be noted that this provision expires in 12 months.

Consultation

On 28 June 2013, the Minister for Health announced a review of the *Mental Health Act 2000* to deliver the best possible healthcare for Queenslanders. The review commenced by inviting the public to identify key areas for improvement in the current Act. An initial round of public consultation took place in July-August 2013. During the two month consultation period, the review held meetings and workshops, including in regional Queensland, with key stakeholders including:

- the Queensland Mental Health Commission
- peak bodies for mental health consumers
- users of mental health services, their families and carers
- legal agencies
- authorised mental health services
- individual victims
- government agencies, including the Public Guardian and the Public Advocate
- the Mental Health Court and other courts
- the Mental Health Review Tribunal.

The first round of public consultation was highly successful with approximately 100 written submissions being received. As a result of the first round of consultation, research and analysis, a Discussion Paper on the review of the Act was publicly released for a further two-month period of public consultation during May to July 2014. The Discussion Paper was placed on the "Get Involved" website and forwarded to all stakeholders who made a submission to the review in the first round of consultation or otherwise expressed an interest in being involved in the consultation process. A range of meetings and workshops were convened during the consultation period, including in regional Queensland. Over 120 submissions were received in response to the Discussion Paper. An analysis of this feedback formed the basis for the Bill.